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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

NO. 719

W. DANIEL PINKERTON AND
WALTER G. PINKERTON,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

HARVEY DERAMUS,
JOHN S. TUCKER, JR.,
R. L. NEWTON,
THOMAS E. SKINNER,
Counsel for Petitioners.

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NO. .....

W. DANIEL PINKERTON AND
WALTER G. PINKERTON,

Petitioners,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable Chief Justice and the Honorable Associate Justices of the Supreme Court of the United States:

W. Daniel Pinkerton and Walter G. Pinkerton, respectfully petition for a writ of certiorari to review a final decision of the Circuit Court of Appeals for the Fifth Circuit, rendered October 30, 1945 (R. p. 249) (not reported). A motion for rehearing was duly filed and was denied on December 1, 1945. This decision affirmed a judgment that was entered on May 2, 1945, by the District Court for the Southern Division of the Northern District of Alabama (not reported).

Questions Presented.

This Petition involves the following questions:

First: Whether, when certain counts of an indictment, some of which were barred by the Statute of Limitations, are held good on demurrer, the judgment partially based on these counts is good.

Second: Whether a jury's verdict of guilty on all the counts submitted to them by the court, and the counts charging substantive offenses do not affirmatively charge a conspiracy, the jury could convict if the facts in evidence show such a conspiracy to exist.

Third: Whether, when the opinion of the Circuit Court of Appeals so states that a jury could convict on all substantive counts of an indictment when there is no affirmative charge of a conspiracy, if this then makes the counts a conspiracy charge.

Fourth: Whether a conviction upon the several counts of an indictment, each, except the last count, charging substantive offenses and the last charging conspiracy to violate a different provision of the Internal Revenue Laws, and where the jury's verdict is supported by evidence of but a single conspiracy, will sustain a sentence of more than two years imprisonment, the maximum penalty for a single violation of the conspiracy statute.

Summary Statement of Matter Involved.

Walter and Dan Pinkerton, petitioners in this case, were convicted in the District Court of the United States for the Southern Division of the Northern District of Alabama on a conspiracy count containing ten separate overt acts speci-

fications in furtherance of the conspiracy. An appeal was taken to the Circuit Court of Appeals for the Fifth Circuit, Case Number 11,006, and the judgment of the lower court was reversed. After this reversal and while the case was pending, the grand jury on the 17th day of April, 1945, indicted Walter and Dan Pinkerton with other named defendants, who are not parties to this appeal, on ten substantive counts and one conspiracy count for violation of the Internal Revenue Laws of the United States of America (R. p. 2). Demurrer was filed by both petitioners to the indictment, which demurrer was overruled by the trial judge (R. p. 13 and p. 25). A plea in abatement was filed by Dan Pinkerton as to Counts 1, 2 and 4 of the indictment, and was sustained (R. p. 16 and p. 26). A plea in abatement by both petitioners to Count 11 of the indictment was overruled (R. p. 18 and p. 26). The trial court submitted the case to the jury on all counts of the indictment as to Walter Pinkerton, and on Counts 3, 5, 6, 7, 8, 9, 10 and 11 as to Dan Pinkerton.

A jury verdict of guilty on all counts of the indictment, except Count 7, was returned against Walter Pinkerton and against Dan Pinkerton on Counts 3, 5, 6, 8, 9, 10 and 11. Each defendant was given a prison sentence and fined, and both took an appeal to the Circuit Court of Appeals for the Fifth Circuit.

The appellee in that case, the United States of America, filed a motion to dismiss appeallants' appeal in the Circuit Court of Appeals on the ground that the notice of the taking of the appeal was filed too late. The court made no decision on this motion to dismiss the appeal, basing this action on the fact that the United States of America obtained the same result as sought by the motion to dismiss the appeal because the case was affirmed (R. p. 244).

Count 1 of the indictment charges Walter Pinkerton and Dan Pinkerton with the possession of eight pints of unstamped whiskey. Count 2 of the indictment charged the defendants with the possession of eight pints of whiskey with intent to defraud the United States of the tax thereon. Count 3 of the indictment charged the defendants with concealing whiskey with intent to defraud the Government of the tax thereon. Count 4 of the indictment charged the defendants with concealing, depositing or removing three pints of whiskey with intent to defraud the Government of the tax thereon. Count 5 of the indictment charged that the defendants did remove, deposit or conceal two gallons of whiskey with the intent to defraud the Government of the tax thereon. Count 6 charged the defendants with concealing a gallon of whiskey with intent to defraud the Government of the tax thereon. Count 8 of the indictment charged the defendants with removing, depositing or concealing certain goods and commodities, namely: a large quantity, to-wit, nineteen gallons of distilled spirits, commonly called whiskey, with the intent to defraud the Government of the tax thereon. Count 9 of the indictment charged the defendants with concealing one pint of whiskey with intent to defraud the Government of the tax thereon. Count 10 of the indictment charged the defendants with the unlawful possession of three and three-fourths gallons of whiskey without the container having stamps affixed thereto. Count 11 of the indictment charged the defendants with a conspiracy with others to combine, conspire, confederate and agree together to commit the acts made offenses and crimes against the United States by Sections 2810, 2833, 2834, 3321, 2803 and 3253, of the Internal Revenue Code of the United States. Sixteen overt acts were set out as having been done by one or more conspirators pursuant to said conspiracy and to effect the object of the conspiracy.

some of the overt acts in the conspiracy count are the same acts set out in the counts charging substantive offenses.

The trial court sentenced W. Daniel Pinkerton, alias Dan Pinkerton, to be committed to the custody of the Attorney General or his representative for a period of thirty months, and fined one thousand dollars ($1,000.00), to stand committed under Counts 3, 5, 6, 8, 9 and 10; and further committed W. Daniel Pinkerton, alias Dan Pinkerton, to the custody of the Attorney General or his authorized representative for the period of two years, and fined five hundred dollars ($500.00), to stand committed under Count 11 of the indictment, said sentence of two years imposed under Count 11 of the indictment to run concurrently with sentence of thirty months imposed under Counts 3, 5, 6, 8, 9 and 10 of the indictment, and that said W. Daniel Pinkerton be further imprisoned until payment of said fines or until said W. Daniel Pinkerton is otherwise discharged as provided by law.

The trial court sentenced Walter G. Pinkerton, alias Walter Pinkerton, to be committed to the custody of the Attorney General or his authorized representative for a period of thirty months and fined five hundred dollars ($500.00), to stand committed under Counts 1, 2, 3, 4, 5, 6, 8, 9, and 10 of the indictment, and to be committed to the custody of the Attorney General or his authorized representative for the period of two years under Count 11 of the indictment, the sentence of two years imposed under Count 11 to run concurrently with the sentence of thirty months imposed under Counts 1, 2, 3, 4, 5, 6, 8, 9 and 10 of the indictment, and the said Walter Pinkerton to be further imprisoned until payment of said fine or until said Walter Pinkerton is otherwsie discharged as provided by law.

An appeal was taken to the Circuit Court of Appeals for the Fifth Circuit on May 2, 1945. On October 30, 1945, the Circuit Court of Appeals rendered an opinion sustaining the judgment of the lower court. (not reported) (R. p. 243). A petition for rehearing was entered on behalf of Daniel Pinkerton and Walter Pinkerton, which said petition for rehearing was denied on December 1, 1945. (not reported) (R. p. 251).

Reasons Why a Writ of Certiorari Should Issue.

1. The Circuit Court of Appeals for the Fifth Circuit has decided an important question in a way that is in conflict with the decisions of this court and of other Circuit Courts of Appeal in that it has in effect held that if a jury finds that conspiracy exists between two or more defendants it might find the defendants guilty of as many offenses as it had illegal objects, and that for each of these offenses greater penalty than the two-year statutory penalty could be imposed.

2. The Circuit Court of Appeals for the Fifth Circuit has decided an important question in a way that is in conflict with the decisions of the Supreme Court of the United States in that it has in effect given approval of the conviction of two defendants on different counts of an indictment which conviction is contrary to the evidence, and in sustaining the conviction based it on the grounds of conspiracy. The penalty imposed is greater than the statutory penalty permitted for the offense of conspiracy against the United States, thereby being in conflict with the decisions of this Court.

3. The Circuit Court of Appeals for the Fifth Circuit has so far departed from judicial rulings of this court, which

in effect provide that a criminal conspiracy is not the commission of the crime which it contemplates, and neither violates nor arises under the statute whose violation is its object, as to call for an exercise of the power of supervision of this court.

Prayer.

For the foregoing reasons, further developed in the accompanying brief, your petitioners respectfully pray that a writ of certiorari issue out of this Honorable Court, directed to the Circuit Court of Appeals for the Fifth Circuit, commanding said Court to certify and send to this Honorable Court on a day to be determined, a full and complete transcript of the record of all proceedings of such Circuit Court of Appeals had in this cause, to the end that this cause may be reviewed and determined by this Honorable Court; that the final order and decree of the Circuit Court of Appeals of the Fifth Circuit may be reversed; and that your petitioners be granted such other and further relief in the premises as to this Honorable Court may be deemed just and proper.

Birmingham, Alabama. December 27, 1945.

W. DANIEL PINKERTON and
WALTER G. PINKERTON,
Petitioners,

By HARVEY DERAMUS
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BRIEF IN SUPPORT OF PETITION.

Opinions Below.

The opinion of the Circuit Court of Appeals for the Fifth Circuit was rendered on October 30, 1945, and is not reported. (R. p. 243). This opinion affirmed the judgment of the United States District Court for the Southern Division of the Northern District of Alabama. A petition for rehearing was duly filed by petitioners and was denied by the Circuit Court of Appeals for the Fifth Circuit on the 1st day of December, 1945 (R. p. 251).

Jurisdiction.

The decree of the Circuit Court of Appeals for the Fifth Circuit was entered October 30, 1945, (not reported), and petition for rehearing was denied on December 1, 1945. (not reported). The jurisdiction of this court is invoked under the provisions of Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925; 43 Stat. 938 (28 U.S.C.A. Section 347).

Statement of the Case.

A summary of the facts is given in the petition, pages 2 to 6 inclusive.

Specification of Errors to be Urged.

All errors assigned in petitioners' appeal to the Circuit Court of Appeals for the Fifth Circuit and all errors assigned in petitioners' application for a rehearing filed in the Circuit Court of Appeals for the Fifth Circuit are intended to be urged here, also all errors believed to be found in the conclusions and opinion contained in the decision of the

Circuit Court of Appeals for the Fifth Circuit of which review is sought.

Summary of Argument.

I. When the unlawful agreement contemplates bringing to pass a continuous cooperation of the conspirators, the conspiracy is said to be continuing, but nevertheless single.

II. A single agreement to commit acts in violation of several penal statutes is to be punished as one conspiracy.

III. Multiplicity of purposes in a conspiracy does not create several conspiracies.

IV. When only one conspiracy is shown, if it be shown, then a sentence of not more than two years imprisonment and a fine can be imposed.

Argument.

We do not waive any argument, assignment of errors, etc., presented in the lower courts, and we attempt here to make this argument as brief and concise as possible.

On appeal to the Circuit Court of Appeals for the Fifth Circuit, the court sustained the judgment of the lower court. Mr. Justice Kennamer wrote the opinion, and among other things, stated that Counts 1 and 10 were barred by the Statute of Limitations and should not have gone to the jury, but this was error without injury. (*Pinkerton, et al* v. *United States* (not reported). (R. p. 243).

As to the petitioner, W. Daniel Pinkerton, this would leave Counts 3, 5, 6, 8, 9 and 11 standing against him, and

Counts 2, 3, 4, 5, 6, 8, 9 and 11 as against the petitioner, Walter G. Pinkerton.

The evidence fully shows that as to the petitioners, in so far as the substantive counts are concerned, they were not guilty of the charges, and under no rules of evidence would this be true. There is only one theory on which the Circuit Court of Appeals could affirm the judgment of the lower court, and that is the theory it used. Mr. Justice Kennamer in his opinion in *Pinkerton, et al* v. *United States* (not reported), (R. p. 243), stated, among other things:

> "In deciding the guilt or innocence of the defendants on the several counts charging substantive offenses the jury could weigh all the foregoing circumstances in determining whether these two appellants were in fact in a conspiracy in the acts that constitute the violations in the manner and form set out in the counts charging substantive offenses, and this would be true if there had been no conspiracy count in the indictment."

Mr. Justice Kennamer further states, and he quotes:

> "'Although conspiracy be not charged, if it be shown to exist, the act of one or more defendants in furtherance of the common plan is in law the act of all.' *Davis* v. *United States*, 12 Fed. (2nd) 253."

From this we can readily see that the Circuit Court of Appeals upheld the conviction on Counts 3, 5, 6, 8, 9, 10 and 11 as to W. Daniel Pinkerton and on Counts 1, 2, 3, 4, 5, that the evidence showed a conspiracy existed, and, therefore, the act of one petitioner was the act of the other. Thus we see that all the counts that went to the jury were based on the theory that a conspiracy existed, and this is further

6, 8, 9, 10 and 11 as to Walter G. Pinkerton, on the theory

evidenced by a statement in the lower court's charge to the jury:

> "In connection with those counts, those substantive things (meaning the first ten counts as to the petitioner, Walter G. Pinkerton, and the first ten counts except Nos. 1, 2, and 4 as to the petitioner, W. Daniel Pinkerton) after you gentlemen have considered all the evidence in this case, if you are satisfied from the evidence beyond a reasonable doubt that at the time the particular substantive offenses were committed, that is the offenses charged in the first ten counts of this indictment, if you are satisfied from the evidence beyond a reasonable doubt that the two defendants were in an unlawful conspiracy, as I have heretofore defined unlawful conspiracy, then you would have a right, if you found that to be true to your satisfaction beyond a reasonable doubt, to convict these defendants on all these substantive counts, provided the acts referred to in the substantive counts were acts in furtherance of the unlawful conspiracy, which you have found from the evidence existed." (R. pp. 191-192).

The trial court seems to have had in mind also that a conspiracy need not be affirmatively alleged but only shown to exist by the facts in evidence.

With this in mind, we now are faced with the fact that each of the eleven counts become separate counts, each charging a conspiracy to violate a separate and distinct internal revenue law of the United States. By the construction of the indictment and as reflected in the charge to the jury there seems to be only the question of a single agreement to commit acts in violation of several penal statutes. When the unlawful agreement contemplates bringing pass a continuous result requiring continuous cooperation of the conspirators, the conspiracy is said to be continuing, but nevertheless single *United States* v. *Kissel*, 218 U.S.

601, 54 L. Ed. 1168, 31 S. Ct. 124; *Brown* v. *Elliott*, 225 U.S. 392, 56 L. Ed. 1136, 32 S. Ct. 812.

The question then to be decided is whether a single agreement to commit acts in violation of several penal statutes is to be punished as one or several conspiracies.

The earlier decisions of the Circuit Court of Appeals for the Sixth Circuit seem to follow the theory that each count of an indictment charging as distinct offenses the several illegal objects of one continuing conspiracy, that it might find the defendants guilty of the many offenses as it had illegal objects, and that for each such offense the two-year statuory penalty could be imposed. *Fleisher* v. *United States* (CCA, 6th), 91 F. (2nd) 404; *Meyer* v. *United States* (CCA, 6th), 94 F. (2nd) 433. The Circuit Court of Appeals for the Fifth Circuit seems to follow the same theory on the basis of its ruling in the case at bar.

The Supreme Court of the United States has a different ruling as set out in the case of *Harry Braverman* v. *United States of America*, 317 U.S. 49, 87 L. Ed. 23. This case holds, among other things, that a conviction upon the several counts of an indictment each charging conspiracy to violate a number of different provisions of the Internal Revenue Laws, where the jury's verdict is supported by evidence of but a single conspiracy, will not sustain a sentence of more than the maximum penalty for a single violation of the conspiracy statute. The court states also in effect, that a criminal conspiracy is not the commission of the crime which it contemplates, and neither violates nor arises under the statute whose violation is its object.

We do not find in the record of the case at bar any claim by respondent that there were separate agreements for such

purposes, separately reached or arrived at, and unless it is so claimed, the conspiracy is still single and not several, however multifarious the purpose. *State* v. *Profita*, 114 N.J.L. 334, 176 A. 683; *Brown* v. *State*, 130 Fla. 479, 178 So. 153.

Multiplicity of purposes in a conspiracy does not create several conspiracies. *Frohwerk* v. *United States*, 249 U.S. 204, 63 L. Ed. 561, 39 S. Ct. 249; *United States* v. *Manton* (CCA 2nd), 107 F. (2nd) 834; *Short* v. *United States* (CCA 4th), 91 F. (2nd) 614; *Powe* v. *United States* (CCA 5th), 11 F. (2nd) 598; *Miller* v. *United States* (CCA 7th), 4 F. (2nd) 228, Writ of Certiorari denied in 268 U.S. 692, 69 L. Ed. 1160, 45 S. Ct. 511; *Murphy* v. *United States* (CCA 7th), 285 F. 801; *United States* v. *Anderson* (CCA 7th) 101 F. (2nd) 325; *Blockburger* v. *United States*, 284 U.S. 299, 76 L. Ed. 306, 52 S. Ct. 180; *Albrecht* v. *United States*, 273 U.S. 1, 71 L. Ed. 505, 47 S. Ct. 250 (distinguished).

When only one conspiracy is shown then a sentence of not more than two years imprisonment and a fine can be imposed. *Frohwerk* v. *United States*, supra; *United States* v. *Manton*, supra; *Powe* v. *United States*, supra; *Miller* v. *United States*, supra; *Murphy* v. *United States*, supra; *United States* v. *Anderson*, supra; Ex Parte Rose (DC) 33 F. Supp. 941.

Under the decision, as rendered by the Circuit Court of Appeals for the Fifth Circuit, in the case at bar the defendants were given a greater sentence than that set out as the maximum in Title 18, Sec. 88 USCA.

We reiterate: that the Circuit Court of Appeals for the Fifth Circuit seems to base its affirmance of the result reached by the trial court on the theory that each petitioner was convicted of the substantive charges because the evidence showed that a conspiracy existed, and, therefore, the act of one petitioner or one defendant was the act of the other. Therefore, we must conclude that the petitioners were in effect charged with a conspiracy in each count of this indictment. If this be true, under the authority of *Braverman* v. *United States*, supra, the petitioners were only guilty, if the evidence shows it, of one conspiracy, and the punishment of imprisonment for thirty months is excessive and not allowed by law.

WHEREFORE, it is submitted that this petition for certiorari to review the decision of the Circuit Court of Appeals for the Fifth Circuit should be granted.

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